

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F210756 (12-13-00) & F310825 (9-04-03)

YOLANDA GASCA, EMPLOYEE

CLAIMANT

KROGER, EMPLOYER

RESPONDENT

SELF-INSURED EMPLOYER

OPINION FILED APRIL 27, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on January 29, 2004, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE STEVEN MCNEELY, Attorney at Law, Little Rock, Arkansas.

Respondent represented by the HONORABLE WENDY WOOD, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-styled claim to determine claimant's entitlement to additional workers' compensation benefits.

On December 16, 2003, a prehearing conference was conducted in these claims from which a prehearing order of December 17, 2003, was filed. The prehearing order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' respective contention relative to the issues. The prehearing order is herein designated a part of the records Commission Exhibit #1.

The testimony of the Yolanda Gasca, the claimant; Betty Jordan; Darrell Pye; James Watson; and Clinton Sanders, coupled with the deposition testimony of the Connie Bradley, along with medical reports and other documents comprise the record in this claim.

DISCUSSION

Yolanda Gasca, the claimant, with a date of birth of March 28, 1957, has a seventh grade education. Claimant commenced her employment with respondent on November 15, 2000.

When the claimant commenced her employment with respondent it was in the position of a bagger. Claimant was later promoted to the position of drug general merchandise clerk. There is no evidence in the record to reflect that the claimant experienced difficulties, limitations, or restrictions on her physical activity relative to her right shoulder prior to December 2000.

Mr. Clinton Sanders, a thirty-two year employee of respondent, has been the store manager of the Colonel Glenn Kroger store for seven years. Mr. Sanders testified that respondent's policy regarding reporting work-related injuries is that injury must be reported immediately to the store manager or assistant manager. If neither of the afore is available, then the injury is reported to the department manager. Mr. Sanders testified regarding the mechanism for disseminating the policy:

Well, before the employees start to work they go through training and orientation, all of them are required. And there's areas in there where they do safety training. It is told to them there to give them information on it. Secondly, it is posted on the bulletin board in every Kroger Store, what to do in the event of an accident and then, thirdly, we do have safety meetings where a representative of their department attends and discusses accidents, what to do, what could have been done to avoid it, that type thing. All the procedures you take if there is an accident, anything that can be done to help prevent or to deal with it, if it happens. (T.59)

On December 13, 2000, claimant suffered an injury to her right shoulder when, while pushing buggies from outside on an icy surface, she slipped and fell on her right shoulder. The

injury was reported to appropriate supervisory personnel of respondent (the co-manger of the store at time), and the claim was accepted as compensable. Claimant was directed to respondent's designated medical provider, St. Vincent Family Clinic, for treatment of the December 13, 2000, compensable injury.

A December 14, 2000, workers' compensation progress sheet authored by Dr. Eisenach at St. Vincent Family Clinic, relative to the claimant, reflects, in pertinent part:

Yolanda works for Kroger. She slip and fell onto the ice yesterday pushing a buggy. She fell on her right shoulder. She is right-handed and she is unable to move her arm much without pain in the shoulder.
(RX 1, p7)

Dr. Eisenach diagnosed the claimant's complaint as right shoulder trauma, directed her to remain off work, and to follow up if she was not able to work on the following Monday. (RX 1, p7). On December 18, 2000, claimant was again seen at St. Vincent Family Clinic relative to the December 13, 2000, right shoulder injury. Claimant was seen by Dr. Steven Simpson, who concluded that claimant was having some right shoulder strained type problem. (RX. 1, p10). Claimant was again seen by Dr. Simpson on December 28, 2000, relative to right shoulder injury, at which time a referral was made to an orthopaedic physician. (RX 1, p14).

On January 3, 2001, claimant underwent an MRI of her right shoulder pursuant to the recommendation of Dr. Michael Stout, of St. Vincent Family Clinic. The radiology report of Dr. Robert W. Laakman, relative to the claimant's January 3, 2001, MRI of the right shoulder reflects:

IMPRESSION: Abnormal signal intensity within the acromion and clavicle as described. There is also evidence for a small full thickness tear of the

supraspinatus tendon. I suspect there is associated tendinosis involving this tendon as well. (RX 1, p17)

On January 12, 2001, claimant was evaluated by Dr. David N. Collins, a Little Rock orthopedic physician, relative to her right shoulder pain growing out the December 13, 2000, accident. Following his evaluation and examination of the claimant, Dr. Collins make the following recommendations:

Additional investigation is needed to precisely determine the work related injury. I would recommend an arthrogram of the right shoulder to rule out full thickness cuff tear. In the Absence of a full thickness cuff tear, she would need to undergo triple phase bone scan, cone down shoulder, to rule out AC joint disorder, right. At the present time, she can continue in her present duty status and use OTC medication. (RX 1, p22)

On January 15, 2001, claimant underwent a right shoulder arthrogram, and January 19, 2001, the triple phase bone scan relative to her right shoulder. (RX. 1, p23-25).

On January 31, 2001, claimant came under the care and treatment of Dr. Bruce F. Safman, pursuant to the referral of Dr. David Collins, relative to her right shoulder pain. Following his examination of the claimant during the January 31, 2001, initial visit, Dr. Safman's impression of the claimant's complaints was that of right shoulder cuff tendinitis, levator scapular tenderness, and cervical and upper trapezius strain. Treatment provided to the claimant by Dr. Safman included trigger point injections, medication, and restrictions on the claimant's job duties relative to her right shoulder. (RX. 1, p26).

A review of the medical in the record reflects that while claimant was seen by Dr. Safman on six (6) subsequent occasions following the initial evaluation, and receive treatment in

the form of medication, she continued to register complaints relative to pain in her right shoulder. (RX 1, p27-32). During an April 2, 2001, visit, Dr. Safman reported relative to claimant's complaints:

On examination, she still reports a great deal of tenderness with palpation of the right shoulder and pain with passive or active range of motion of the right arm. (RX 1, p30)

When again seen by Dr. Safman on May 2, 2001, claimant reported that her right shoulder pain remain basically unchanged. Dr. Safman noted that the claimant had a great deal of tenderness on examination during the May 2, 2001, visit. The May 2, 2001, report of Dr. Safman concludes:

I believe that she is at maximum medical improvement relative to her shoulder problem. She is being trained to do a job in the supermarket which will not require a great deal of lifting, which I think is appropriate. Her symptoms are subjective in nature. She had a 0% disability rating.

I gave her samples and a prescription for Gabitril. She is to titrate the medication up to 4 mg bid. I will be seeing her after today for medication maintenance. If the Gabitril is not helpful, I would have little else to offer her but would maintain her for a short period of time on the current medications. I will reassess her in 3 weeks. (RX 1, p31)

Claimant was last seen by Dr. Safman on May 23, 2001, relative to her December 13, 2000, right shoulder compensable injury. Dr. Safman noted during the May 23, 2001, visit that the claimant was working full duty; that there was no need for her to be seen by him on a regular basis thereafter; that he would discontinue the Gabitril as it was not effective; and that he felt

that the claimant's problem was a mild rotator cuff tendinitis on the right side. (RX 1, p32)

Claimant returned to the employment of respondent in May 2001, following her release by Dr. Safman relative to the December 13, 2000 compensable right shoulder injury. Claimant presents credible testimony that she continued to experience complaints relative to her right shoulder upon her return to the employment of respondent. The afore is corroborated by the medical documentation of Dr. Safman wherein he noted claimant's continued complaints of pain in the right shoulder throughout his period of treatment. Claimant testified that whenever she lifted significant weights or elevated her right arm above her shoulder she experienced severe pain in the right shoulder. As a consequence of the afore continued complaints, in January 2002, claimant sought treatment under the care of Dr. Charles E. Pearce, Jr. , a Little Rock orthopedic physician.

A January 12, 2002, report of Dr. Charles E. Pearce, Jr., relative to the claimant, reflects, in pertinent part:

Ms. Gasca is a 44-year old, right-handed, lady seen for a work injury that occurred on 12/13/00 while gainfully employed at Kroger. Her detailed history is well-described in Dr. Collins' note of 1/12/01. Evaluation has included MRI scan, showing the possibility of small full thickness tear rotator cuff tear. However, arthrogram and bone scan done subsequently showed no pathology. Ms. Gasca has been treated for neck symptoms by Dr. Safman last spring, which mostly consisted of medications and medicated creams.

Currently, she complains of pain that begins in her shoulder. She does have some referred pain into her hand: Specifically, into her long and index fingers, and thumb. She is taking no medication and has no allergies. She has continued her regular work as a

bagger and also works as the drug general manager. Her health history is otherwise good. . .

PHYSICAL EXAMINATION: She is 5'2" and 210 pounds. No obvious atrophy or abnormality about the shoulder. She has no pain to palpation throughout her shoulder. She has mild pain with impingement, and mild pain and weakness with rotation and abduction. Negative O'Brien, Speed, and lift-off. Motor is intact to resistance. Intact biceps, triceps, and brachioradialis reflexes. She has painless motion of her neck and 2+ radial pulse. There is no gross sensor loss distally.

* * *

IMPRESSION: Right shoulder and arm pain - Perhaps, this is referred pain from her neck. (RX 1, p33)

Among the recommendations contained in the January 11, 2002, report of Dr. Pearce, relative to the claimant, was to precede with the MRI of the claimant's cervical spine, physical therapy for her neck and shoulder, and that claimant continued to do her regular job duties. (RX 1, p34). The evidence discloses that Dr. Pearce faxed a copy of his January 11, 2002, report relative to the claimant, to the third-party administrator for respondent-employer's workers' compensation program. (RX 1, p34).

The testimony of Ms. Connie Bradley, who was a claim adjuster for RSKCO, a third-party administrator for respondent-employer during the pertinent time period, reflects regarding the January 2002, report of Dr. Pearce:

Well, when I got the report, I reviewed it, and - - because I really didn't know what it was about, you know; there had been such a lapse of time. So what I did was call the store to see what was going on.

I can't remember the store manager's name. It was a co-manager, and I asked him about the medical report, and he basically did not know anything about it. I asked for the store manager at that time. I think his name was Clint Sanders. He was not available that day. So at that time I asked to speak with the employee, Ms. Gasca, and spoke with her about the report.

Ms. Gasca was a little frustrated that I had the medical reports; she asked me how I got it. And I told her that basically we apparently received the report from Dr. Pearce. And she indicated to me at that time that I should never have received that report, that it was not work-related, it had nothing to do with her work, and she had no intention of filing it as work-related. (RX. 2, p8-9)

Ms. Bradley testified that she next heard from the claimant in September 2002:

She told me that she had been off work since - - I think it was around February 26th, and that she wanted me to pay her temporary total disability benefits. And I asked her what had happened, she said that she was in a car wreck. (RX 2, p10)

Ms. Bradley asserts that claimant relayed that she had had an MRI which had revealed a tear after the automobile accident. (RX 2, p10)

Claimant acknowledged that she was involved in a motor vehicle accident on February 25, 2002, however maintains that the injury suffered in the accident did not involve her right shoulder. Claimant's testimony reflects that following her MRI of the right shoulder pursuant to the directions of Dr. Pearce, she requested workers' compensation benefits, however the same was denied. Claimant also acknowledged that she spoke with the claim adjuster, Ms. Connie Bradley, and requested workers' compensation benefits.

The evidence in the record reflects that claimant received treatment under the care of a

physician, Dr. Thomas Eans, relative to the injury growing out of the February 25, 2002, motor vehicle accident. (CX 1, p22-32). A review of the medical reports of Dr. Eans reflects that claimant was treated for an acute lumbar strain/ chronic lumbar pain syndrom as complaints growing out of the February 25, 2002, motor vehicle accident. There is no evidence in the records of Dr. Eans to reflect that claimant registered complaints relative to her right shoulder as growing out of the February 25, 2002, motor vehicle accident. Additionally, a review of the Arkansas Motor Vehicle Collision report relative to the February 25, 2002, accident, involving the claimant reflects that she complained of pain in her lower back. The report does not reflect any complaints of pain relative to the claimant's right shoulder growing out of the February 25, 2002, motor vehicle accident. (RX 1, p33-35)

The claimant continued to discharge her employment duties with respondent following her January 11, 2002, initial evaluation with Dr. Pearce. As previously noted, during the January 11, 2002, visit, Dr. Pearce had recommended preceding with a MRI of the claimant's cervical spine. Claimant contends that the MRI had in fact been scheduled prior to the February 25, 2002, motor vehicle accident. The fact that the record reflects a February 26, 2002, MRI of the claimant's cervical spine is corroborative of the contention. There is no evidence to reflect that the claimant registered complaints relative to her cervical spine in the February 25, 2002, motor vehicle accident. The February 26, 2002, cervical spine MRI did not disclose evidence of disk herniation in the cervical spine. (RX 1, p35)

After obtaining the negative results from the February 26, 2002, cervical MRI, Dr. Pearce noted during his March 12, 2002, visit with the claimant:

. . . Despite the fact that she had right arm referred

type pain, the MRI of her neck does not show any disc rupture or nerve impingement. Ms. Gasca apparently, did not go to physical therapy, as I had asked. She has continued with her regular work duties. She is continuing to take Vioxx, as I had ordered.

PHYSICAL EXAMINATION: Her shoulder pain and arm pain is about the same. She has pain with impingement testing. There is still some mild pain with rotation and abduction.

RECOMMENDATION: It is my recommendation that we complete her evaluation with an MRI of her right shoulder. If there is pathology there, that may need to be addressed. She will continue, in the interim time, with her regular duties and Vioxx 24 mg 1 daily. (RX 1, p36)

On March 13, 2002, claimant underwent an MRI of her right shoulder pursuant to the recommendation of Dr. Pearce, (RX 1, p37), and was seen in follow up by Dr. Pearce on March 15, 2002. The March 15, 2002, report of Dr. Pearce, relative to the claimant, reflects:

IMPRESSION: Chronic right shoulder impingement and acromioclavicular joint arthrosis, possible underlying rotator cuff tear. (RX 1, p38)

Treatment options were discussed with the claimant, who elected to precede with right shoulder arthroscopy.

On April 3, 2002, claimant underwent surgery under the care of Dr. Pearce in the form of arthroscopic subacromial decompression, distal clavicle resection, repair rotator cuff with one 5.0 cork screw. Dr. Pearce's operative report reflects post-operative diagnosis relative to the claimant's right shoulder complaint, included impingement, AC arthrosis and large partial thickness with almost complete tear rotator cuff the 1 x 2 centimeters. (RX 1, p39-40)

The testimony in the record reflects that the claimant was off work relative to her treatment under the care of Dr. Pearce for her right shoulder from the date of surgery, April 3, 2002 until September 10, 2002, when she was released to regular duties without restrictions. (CX 1, p19). While claimant was released to regular duties on August 5, 2002, the release carried with it restrictions or limitations, to include no lifting greater than 25 pounds and no prolong over shoulder work. (CX 1, p18).

The testimony of Mr. Clinton Sanders, the store manager, reflects that he had a conversation with the claimant regarding her request for workers' compensation benefits subsequent to the February 25, 2002, motor vehicle accident:

I don't remember the exact date but I remember she came up to the office and we sat down and talked because she wanted me to fill out a form so that she could be covered under it. And I did discuss it with her and I told her I would refer it to our office but I couldn't give her any assurance because normally automobile accidents are not covered under the workers' comp policy. (T 67-68)

Mr. Sanders acknowledged that he did not recall asking the claimant if her request for workers' compensation benefits was related to the shoulder condition prior to February 25, 2002, motor vehicle accident.

Mr. Sanders testified that it is the policy of respondent that it will not provide light duty work for an employee who has suffered a non-work related injury. (T. 65). Accordingly, based upon policy of respondent and the fact that respondent did not deem claimant's right shoulder complaint subsequent to May 23, 2001, as being work related, light duty or restricted duty work was not offered to the claimant following her April 3, 2002, surgery under the care of Dr. Pearce

at the time she was released on August 5, 2002.

Claimant's testimony reflects that after she was released by Dr. Pearce to return to work she returned to the employment of respondent in late 2002. Claimant testified that her shoulder was okay following the surgery by Dr. Pearce, and her return to the employment of respondent. The evidence in the record reflects that the claimant discharged her employment duties from September 2002 until September 4, 2003. There is no evidence in the record to reflect that the claimant sought or obtained medical treatment under the care of Dr. Pearce or any other physician relative to her right shoulder subsequent to September 10, 2002.

The record does reflect a November 19, 2002, clinic note of Dr. Pearce relative to a visit by the claimant:

Ms Gasca returns after right shoulder arthroscopic repair, rotator cuff, and she is doing reasonably well. She has been back to work and has just a bit of pain at the extremes of motion. (CX 1, p21)

The November 19, 2002, clinic note also reflects that the claimant had reached maximum medical improvement as of said date and that she had a permanent physical impairment in the amount of 4% to the body as a whole in accordance with the Guide To The Evaluation Of Permanent Impairment, 4th Edition. Further, the November 19, 2002, report reflects that a copy of same was faxed to the claim adjuster for the third-party administrator for respondent-employer's self-insured workers' compensation program. (CX 1, p21)

Claimant discharged here regular employment duties in the employment of respondent from September 10, 2002, through September 4, 2003. On September 4, 2003, claimant asserts that she suffered an injury to her right shoulder while discharging employment duties for

respondent:

They put a pallet in the back and it was too high so I tried reaching so I could take it off, we could separate everything to where it goes to, the place we were putting them. And when I tried to take a tote off, I just felt a pop on my right shoulder. So, I just pushed it back. And I went to go get James to help me take all the totes off. (T 14-15)

Claimant testified that the “James” that she referenced in her testimony was not the same individual as the co-manager, James Watson. Further, the testimony of the claimant reflects that there was a female co-worker in the area at the time of her September 4, 2003, Injury, and while she was not certain if the co-worker actually witness the accident, she did in fact relayed to the co-worker what had occurred. Claimant’s testimony reflect that the co-worker “James” told her to take it easy and that he took everything else off.

Claimant testified that the incident involving the right shoulder on September 4, 2002, occurred at approximately 10:30 a.m. After the occurrence, claimant did not report the injury to supervisory personnel of respondent, but rather continued to discharge her employment duties. The testimony of the claimant reflects that she told her union representative, Mamie Forster, about the injury. (T.21)(T. 51). Claimant was directed by the union representative to report the injury to her immediate supervisor. Claimant reported the injury to Mr. James Watson, the co-manager of the Kroger, who in turn completed the paperwork and referred the claimant to respondent’s designated medical provider, St. Vincent Family Clinic.

The claimant was seen by the physicians at St. Vincent Family Clinic pursuant to the direction of respondent-employer on September 4, 2003, regarding her right shoulder injury of the same date. After being examined by the physician, claimant was told that an orthopedic

referral would be necessary and was furnished a light duty release. The evidence in the record reflects that each time claimant was furnished a light duty release by medical providers after September 4, 2003, she provided same to respondent-employer. Claimant's testimony reflects that she is not physically capable of performing her regular job duties in the employment of respondent and has not been so since the September 4, 2003, accident.

Darrell Pye, a dairy clerk at the Colonel Glenn Kroger, testified that his department was adjacent to general merchandising, the sit where claimant discharged her employment duties. Mr. Pye's testimony reflects that he was working on September 4, 2002[3] when the claimant is alleged to have suffered a new shoulder injury. Mr. Pye testified that he first saw the claimant at approximately 10:00 a.m. that morning:

She just come out of the general merchandising
back room with a cart. She was going to the diaper,
by formula aisle to stock. (T.45)

Mr. Pye said he saw the claimant a couple hours later, around 12:00 noon, at which time she was pulling a pallet jack with some pallet and totes on it to the back of the storeroom, indicative of the fact that the totes were empty. Mr. Pye testified that if the claimant was having problems with her shoulder on September 4, 2003, she did not say anything to him. Further, Mr. Pye's testimony reflects that if the claimant was having problems with her shoulder prior to September 4, 2003, she did not say anything to him about it.

There is no evidence in the record to reflect that the claimant had regular communication with Mr. Pye during the time of her employment with respondent or that she would have any reason to discuss with him whether or not she was having problems with her right shoulder. Mr. Pye has been employed by respondent at the same store for eight years. The evidence clearly

reflects that on December 13, 2000, claimant suffered a work-related injury to her right shoulder. Further, as noted above, claimant continued to experience complaints with the right shoulder following the December 13, 2000, injury, through September 10, 2002. Mr. Pye's testimony reflects that claimant never said anything to him regarding her right shoulder complaint prior to September 4, 2003, or subsequent to that date.

James Watson, who has held the position of co-manager of Colonel Glenn store since 2002, testified that he came to the store after the claimant's February 2002, motor vehicle accident. Mr. Watson's testimony reflects that after the claimant returned to the store in September 2002, following her shoulder surgery, she saw her on a regular basis and that he never noticed her having any problems with her right shoulder. Additionally, Mr. Watson testified that the claimant never complained to him about shoulder pain or wanting to see a doctor until the September 2003, incident. (T.51)

Mr. Watson's testimony reflects that in September 2003, he became aware of the claimant's alleged injury of September 4, 2003, when the union representative, Ms. Mamie Foster, reported it to him. In response to the reporting by Ms. Foster, Mr. Watson testified:

I reported to Mamie that Yolanda needs to make the report to me herself, that's our policy. (T. 52)

Mr. Watson testified that the claimant came to him between 12:00 and 1:00 P.M. on September 4, 2003, and relayed that she had sustained an injury to her right shoulder. Mr. Watson testified:

Ms. Gasca did come to me at around between 1:15 and 1:20 to report the incident.

* * *

She told me that she had hurt her shoulder while she

was trying to take a heavy tote off the pallet. (T.52)

In response to reporting, Mr. Watson testified:

Basically what I did, once she reported the injury, I make up an associate package there at the store. We filled out all the paperwork right there with her sitting there. I also have to report it on the site that we have called the Sedgwick Claim Site and filled out that paperwork also. She was real distraught saying that her shoulder was hurting and I asked her if she'd like to see a doctor and she said she would. Our immediate clinic is directly across the street from our store and I sent her over to the St. Vincent clinic and from there I asked if she gets any worse to get back to me so I could sent it all in together to our risk management office. (T. 52-53)

The last day that the claimant worked for respondent was September 4, 2003. The testimony of Mr. Watson reflects that he has seen the claimant in the store on occasions since September 4, 2003, delivering Avon products, conversing with other associates in the store, at the pharmacy, and shopping. Mr. Watson testified regarding his observation of the claimant during her subsequent visits to the store:

Her arm, one was in a sling but other than that, no, she was handling the merchandise, handing it out.(T.54)

The testimony of Mr. Clinton Sanders, the store manager of the Colonel Glenn Kroger store, testified that an immediately investigation is conducted by supervisory personnel of respondent-employer once a work-related injury is reported to appropriate personnel. Regarding the investigation, Mr. Sanders testified:

Well, we interview the employee, if they are able to talk and have them fill out a statement. We talk - - ask them for any witnesses that they know of. And

we interview those witnesses and have them fill out statements. Anybody having knowledge of it at all we take with them and ask time to fill out a statement. Then we fill out all the appropriate paperwork and forward it - - we fax it that same day to our office and then we follow with a written copy to them on completion. (T. 69)

Mr. Sanders conducted an investigation relative to the claimant's September 4, 2003, injury after it had been reported to the co-manager. Claimant testified that there was a female co-worker present at the time of the September 4, 2003, accident however she did not know her name. Mr. Sanders testified regarding his contact with the unidentified female co-worker who had been mentioned by the claimant:

There was an employee that, I think her name was Kemper, she's not employed there now but she was working in the department and I talked with her and she said that she didn't see anything. She said Yolanda told her what had happened. (T. 70)

The testimony of Mr. Sanders reflects, regarding his conversation with the claimant after she received medical treatment for the September 2003, incident:

After she had been to the doctor she brought a statement back to the store essentially starting that she had to see an orthopedic doctor. She couldn't return until she saw an orthopedic doctor. And I forwarded it or instructed her I forwarded it to our office and that they would have to make the determination as to whether, you know, we could send her to an orthopedic doctor. They are the ones that do the referring. We don't do that anyway. So, I did have the discussion with her. (T. 64)

Mr. Sanders testified that within a matter of a few days to a week Risk Management determined that the claimant's September 4, 2003, incident, was a non-work related injury and that they were

going to sent out a letter to the claimant indicating that respondent would not cover it.

The medical in the record reflects that on September 4, 2003, claimant was seen at St. Vincent Family Clinic pursuant to the direction of supervisory personnel of respondent as a result of a reported September 4, 2003, work-related injury to her right shoulder. Claimant was examined by Dr. Michael Stout during the September 4, 2003, visit. The patient progress sheet, relative to the September 4, 2003, visit reflects, in pertinent part:

Yolanda was doing some lifting when she had a sudden shooting pain into her right shoulder. The same shoulder that was operator on a couple years ago. She relates that the shoulder in question has never been totally pain free. She has some shooting pain down her arm and has had significant swelling pop up over the past few hours, down her arm. She is unable to take her ring finger off and this starting to become painful to her. No distal numbness or tingling. (RX 1 p32)

Dr. Stout assessed the claimant's injury during the September 4, 2003, visit as recurrent rotator cuff injury. The September 4, 2003, report further reflects that claimant was provided a sling and directed to remain off work until she was seen by an orthopedic. Finally, claimant was provided medication by Dr. Stout during the September 4, 2003, visit. (RX 1, p21).

It is not disputed that claimant furnished the workers' compensation treatment form to respondent, which was provided to her by Dr. Stout following her September 4, 2003, visit. Respondent refused to authorize an orthopedic referral relative to claimant's September 4, 2003, injury. Both the Workers' Compensation Treatment Form and the Patient Progress Sheet of September 4, 2003, reflect objective findings relative to the claimant's injury. (CX 2, p1)(RX 1, p21). On November 17, 2003, claimant was again seen at St. Vincent Family Clinic relative to

September 4, 2003, injury. The Workers' Compensation Treatment Form generated during the visit reflects a diagnosis of rotator cuff injury- needs orthopedic, not improved. (CX 2, p2)

After a thorough consideration of all of the evidence in this record, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. At all times pertinent the relationship of employee-employer existed between the parties.
3. On December 13, 2000 and September 4, 2003, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$113.00 and \$150.00 for temporary total disability benefits, respectfully.
4. On December 13, 2000, the claimant sustained an injury to her right shoulder arising out of and in the course of her employment.
5. The claimant was temporarily totally disabled for the periods beginning April 4, 2002 and continuing through September 10, 2002, as a result of the December 13, 2000, compensable injury.
6. The claimant's healing period ended November 19, 2002, as a result of her December 13, 2000, compensable injury.
7. The claimant has a permanent physical impairment in the amount of 4% to the body as a whole as a result of the December 13, 2000, compensable injury.
8. Medical treatment rendered to the claimant under the care of Dr. Charles Pearce subsequent to January 11, 2002, was reasonably necessary relative to claimant's December 13, 2000, compensable injury. Respondent is liable for the cost of the afore medical treatment to

include surgery.

9. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of December 13, 2000.

10. On September 4, 2003, the claimant sustained an injury to her right shoulder, in the form of a new injury or aggravation of her pre-existing condition, arising out of and in the course of her employment.

11. The claimant was temporarily totally disabled for the periods beginning September 5, 2003, and continuing through the end of her healing period, or until such time as she has been returned to appropriate employment with respondent.

12. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of September 4, 2003.

13. The respondent has controverted the payment of temporary total disability benefits to claimant relative to the December 13, 2000, compensable right shoulder injury for the periods April 4, 2002 through September 10, 2002; the payment of medical benefits relative to the December 13, 2000, compensable injury subsequent to January 11, 2002; and the payment of permanent physical impairment in the amount of 4% to the body as a whole as a result of December 13, 2000, compensable injury. Respondent has controverted the payment of all benefits relative to the claimant's September 4, 2003, compensable injury.

CONCLUSIONS

The present claims before the Commission by the claimant entail a claim for additional temporary total, and indemnity benefits to correspond with a 4% anatomical impairment relative to an acknowledged compensable December 13, injury suffered by the claimant in the

employment of respondent, and the compensability of a September 4, 2003, injury in the employment of respondent.

With respect to the December 13, 2000, injury, respondent maintains that the claimant has been paid appropriate workers' compensation benefits and that she is not entitled to additional medical and indemnity benefits, to include benefits to correspond with an anatomical impairment as a result of the compensable December 13, 2000, right shoulder injury. Respondents deny the compensability of the September 4, 2003, claim in its entirety.

The present claims are governed by the provisions of Act 796 of 1993, in that claimant asserts entitlement to workers' compensation benefits as a result of injuries having been sustained subsequent to the effective date of the afore provision.

Respondents acknowledge compensability of the December 13, 2000, right shoulder injury suffered by the claimant. At issue is whether claimant is entitled to additional medical and indemnity benefits relative to the December 13, 2000, compensable injury subsequent to May 23, 2001. There is no evidence in the record to reflect that the claimant experienced any restrictions on her employment activities relative to her right shoulder prior the December 13, 2000, compensable injury in the employment of respondent, when she fell on an icy surface while pushing a buggy at work. Further, there is no evidence in the record to reflect that the claimant required medical treatment relative to her right shoulder prior to December 13, 2000.

The evidence reflects that subsequent to December 13, 2000, claimant continues to experience pain and complaints relative to her right shoulder attributable to the fall suffered on said date. A review of the medicals from the physicians from the St. Vincent Family Clinic, respondent's designated medical provider, reflects objective finding of injury as well as

subjective complaints of pain registered by the claimant regarding t her right shoulder. While under the care and treatment of Dr. Collins, claimant underwent diagnostic studies, to include an arthrogram of the right shoulder and a triple phase bone scan. The medical reflects that at the time Dr. Collins referred the claimant to Dr. Bruce Safman, relative to claimant's right shoulder complaint, claimant remain symptomatic.

An MRI of the claimant's right shoulder reflect objective finding of a partial tear in the claimant's right rotator cuff. The medical evidence in the record reflects that throughout the claimant's treatment under the care of Dr. Safman, she remained symptomatic relative to her right shoulder. Dr. Safman's treatment relative to the claimant's right shoulder complaint consisted of medication. Finally, Dr. Safman concluded in his May 2, 2001, office note that if the Gabitril, which had been furnished the claimant relative to her right shoulder pain, was not helpful, he had nothing else to offer her relative to her right shoulder complaint other than to maintain her for a short period of time on her current medication. (RX 1, p31). When the claimant was last seen by Dr. Safman on May 23, 2001, his report noted that she was continuing to have right shoulder pain, and he concluded that her problem was mild rotator cuff tendinitis on the right side. (RX. 1, p32)

The credible evidence in the record reflects that the claimant continued to experience complaints relative to her right shoulder subsequent to May 23, 2001. While claimant continued to discharge her employment duties with respondent, her continued symptoms resulted in claimant seeking medical treatment under the care of Dr. Charles E. Pearce, Jr. , on January 11, 2002. Claimant disclosed the history of the December 13, 2000, work-related injury to her right shoulder as the basis for the need for medical treatment to Dr. Pearce. The evidence clearly

reflects that at the time claimant was last seen by Dr. Safman on May 21, 2002, he indicated that he had nothing further to offer her relative to treatment for her December 13, 2000, compensable right shoulder injury.

The claimant registered complaints relative to her right shoulder to Dr. Pearce at the time of her January 11, 2002, visit, and that she attributed same to the December 13, 2000, compensable injury in the employment of respondent. A review of the medical records of Dr. Pearce reflects the scheduling of a cervical MRI scan during the January 2002, visit. On February 25, 2002, claimant was involved in a motor vehicle accident, however she did not suffer an injury to her right shoulder in the accident either in the form of a new injury or aggravation of the pre-existing right shoulder complaint.

Diagnostic studies performed by Dr. Pearce subsequent to the January 11, 2002, initial visit relative to the claimant were reasonable, necessary, and related to claimant's December 13, 2000, compensable injury. Dr. Pearce directed a additional or repeat MRI for claimant's right shoulder which resulted in the diagnosed rotator cuff tear and other complaints, which grew out of the December 13, 2000, compensable injury. On April 3, 2002, claimant underwent surgery under the care of Dr. Pearce relative to her December 13, 2000, injury.

The claimant was off work as a result of the December 13, 2000, compensable injury, while under the care and treatment of Dr. Pearce from April 3, 2002 through September 10, 2002. An employer must promptly provide for an injured employee such medical treatment as maybe reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a). What constitutes reasonably necessary medical treatment is a fact question. *Wright Contracting Company v. Randall*, 12 Ark. App. 358, 676 S.W. 2d 750 (1984).

In the instant claim the evidence preponderates that medical treatment rendered to the claimant under the care of Dr. Charles E. Pearce, Jr., was reasonably necessary relative to the claimant's December 13, 2000, compensable injury. Following the claimant's April 3, 2002, surgery, under the care of Dr. Pearce, the condition in her right shoulder progressed to the point that she was able to return to the employment of respondents without restrictions and virtually asymptomatic, as of September 10, 2002.

There is no evidence to reflect that the claimant suffered an injury to her right shoulder in the February 25, 2002, motor vehicle accident. Respondent has controverted claimant's entitlement to reasonably necessary medical treatment under the care of Dr. Charles Pearce, Jr., subsequent to January 11, 2002. The evidence preponderates that the claimant's authorized treating physician, Dr. Safman, had no further medical treatment to render to the claimant subsequent to May 23, 2001, despite the fact that the claimant remain symptomatic on said date and had so remained since here December 13, 2000.

A claimant is entitled to temporary total disability benefits during the healing period if she shows by a preponderance of the evidence that she is totally incapacitated to earn wages. *Carroll General Hospital, v. Green*, 54 Ark. App. 102, 923 S.W. 2d 878 (1996). Ark. Code Ann. 11-9-102(12) defines healing period "as that period for healing of an injury resulting from an accident." The evidence preponderates, with respect to the claimant's acknowledged compensable December 13, 2000, right shoulder injury, that she remained in her healing period subsequently to May 23, 2001. Objective medical findings are not required to find that the claimant's healing period continues. *Chambers Door Industry, Inc. v. Graham*, 59 Ark. App. 224, 95 6 S.W. 2d 196 (1997). In the instant claim, the underlying condition causing the

claimant's disability had not become stable and further medical treatment was available and need to improve the condition of the claimant's right shoulder. Accordingly, while the claimant returned to regular employment duties on or about May 23, 2001, she had not reached maximum medical improvement.

The evidence discloses that as of April 3, 2002, claimant was off work pursuant to the directions of her treating physician while she underwent surgery relative to her December 13, 2000, right shoulder compensable injury. Claimant remained under the care and treatment of her physicians subsequent to April 3, 2002 through September 10, 2002, when she was permitted to return to the employment of respondent without restrictions. Claimant asserts that she is entitled to temporary total disability benefits during the afore period.

Temporary total disability is that period within the healing period in which the claimant suffers a total incapacitated to earn wages. *Georgia-Pacific Corp., v. Carter*, 62 Ark. App. 162, 969 S.W. 2d 677 (1998); *Safford v. Arkmo Lumber Company*, 54 Ark. App. 286, 925 S.W. 2d 170 (1996). Claimant was released to full duty by Dr. Pearce on August 5, 2002, claimant was released to return to regular duties, however restriction was placed on her employment activities, to include no lifting weights greater than 25 pounds and no prolong over shoulder work. (RX. 1, p44). Respondent had deem that the treatment for the claimant right shoulder subsequent to January 11, 2002, was not work related. Pursuant to his policy, respondent did not offer or afford claimant assess to light duty work pursuant to the August 5, 2002, restricted duty release. In tune with the policy of respondent, claimant was not permitted to return to work until September 10, 2002, when she was released without restrictions on her employment activity. Claimant is entitled to the payment of temporary total disability benefits from April 3, 2002 through

September 10, 2002. Respondent has controverted claimant entitlement to the afore temporary total disability benefits.

The evidence discloses that when seen in follow up by Dr. Pearce on November 19, 2002, the extent of the claimant's anatomical impairment as a result of the December 13, 2000, right shoulder injury and subsequent surgery was assessed at 4% to the body as a whole, pursuant to the *Guide To The Evaluation Of Permanent Impairment*, 4th Edition. (RX 1, p47).

Respondents has controverted the claimant's entitlement to permanent indemnity benefits to correspond with her 4% impairment to the body as a whole as a result of the December 13, 2000, compensable injury.

The evidence preponderates that upon returning to the employment of respondent on September 10, 2002, claimant discharged her regular employment duties without complaints or difficulty. Claimant continued performing her regular employment duties without restrictions or limitations from September 10, 2002, until September 4, 2003.

There is no evidence in the record to reflect that claimant obtained active medical treatment relative to her right shoulder subsequent to September 10, 2002. On September 4, 2003, while discharging employment duties for respondents, claimant while lifting a heavy tote, experience a pop in her right shoulder and a corresponding on set of severe pain in the right shoulder and arm. The claimant relayed the occurrence of the injury and complaints to co-workers following it occurrence. The investigation conducted by supervisory personnel of respondent confirms that claimant relayed to a female co-worker the occurrence of the September 4, 2003, injury. Further, claimant relayed the occurrence of the injury to her union representative, Ms.Mamie Foster, who reported the injury to Mr. James Watson. Claimant

reported the injury to Mr. Watson, pursuant to the directions relayed by Mr. Watson to Ms. Foster.

Pursuant to the policy of respondent, after obtaining the necessary information for recording the reported injury, claimant was directed to obtain medical treatment at respondent medical provider, St. Vincent Family Clinic, which she obtain on September 4, 2003. The medical in the record reflects that claimant was seen by Dr. Michael Stout on September 4, 2003, and relayed a history of the September 4, 2003, work-related injury to her right shoulder while discharging employment duties for respondent. The evidence discloses that claimant experienced swelling in her right shoulder which was observed by Dr. Stout during the September 4, 2003, examination. Further, claimant was directed to remain off work until she was seen by an orthopedic physician relative to the injury.

The evidence preponderates that the claimant sustained a work-related injury to her right shoulder on September 4, 2003, while discharging employment duties for respondent, in the form of either a new injury or an aggravation of a pre-existing condition. Further, the evidence preponderates that the claimant was rendered totally incapacitation from engaging in gainful employment as of September 4, 2003, and has remained so since. Respondent has controverted the compensability of the September 4, 2003, injury in its entirety.

AWARD

Respondent is hereby ordered and directed to pay to the claimant temporary total disability benefits at a weekly compensation benefit rate of \$113.00, for the period April 3, 2002 through September 10, 2002, as a result of the claimant's compensable injury of December 13, 2000. Said sums accrued shall be paid in lump without discount.

Respondent is further ordered and directed to pay partial disability benefits to the claimant at the weekly compensation benefit rate \$113.00, to correspond with the claimant's 4% permanent physical impairment to the body as a whole growing out of claimant's December 13, 2000, compensable right shoulder injury in the employment of respondent. Said sums accrued shall be paid in lump without discount.

Respondent is further ordered and directed to pay all reasonable related medical, hospital, nursing, and other apparatus expenses, to include medical related travel, growing out of the claimant's December 13, 2000, compensable injury in the employment of respondent. Medical treatment rendered to the claimant under the care of Dr. Charles E. Pearce, Jr., as well as authorized referrals there from subsequent to January 11, 2002, is reasonable, necessary, and casually related to claimant's December 13, 2000, compensable injury. Respondent is liable for the cost of said treatment.

Respondent is further ordered and directed to pay to the claimant temporary total disability benefits at the weekly compensation benefit rate of \$113.00, for the period September 5, 2003, and continuing to the end of her healing period are until such time as claimant has been allowed to return to appropriate employment duties of respondent as a result of claimant's September 4, 2003, compensable right shoulder injury in the employment of respondent. Said sums accrued shall be paid in lump sum without discount.

Respondent is further ordered and directed to pay all reasonable related medical, nursing, and other apparatus expenses, to include medical related travel, growing out of claimant's September 4, 2003, compensable injury.

Maximum attorney fees are herein awarded to the claimant's attorney on the controverted

portion of this award, in accordance with *Holiday Inn-West v. Coleman*, as same related to the December 13, 2000, compensable injury in the employment of respondent. Maximum attorney fees are further awarded to the claimant's attorney, the Honorable Steven McNeely, pursuant to Ark Code Ann. §11-9-715, relative to the claimant's September 4, 2003, compensable injury,

This Award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood
Administrative Law Judge